

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

Respondent,

v.

CLARENCE ARTHUR TREMAINE,

Appellant.

**DOCKET NUMBER WD70670
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Date: July 27, 2010

Appeal from:
Boone County Circuit Court
The Honorable Kevin M. J. Crane, Judge

Appellate Judges:
Division One: Lisa White Hardwick, Presiding Judge, James M. Smart, Jr. and Alok Ahuja, Judges

Attorneys:
Emmett D. Queener, Esq., Columbia, MO, for appellant.
Shaun J. Mackelprang, Esq. and Jayne T. Woods, Esq., Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

STATE OF MISSOURI

v.

CLARENCE ARTHUR TREMAINE,

WD70670

Respondent,

Appellant.

Boone County

Before Division One Judges: Lisa White Hardwick, Presiding Judge, James M. Smart, Jr. and Alok Ahuja, Judges

Appellant Clarence Tremaine was convicted in the Boone County Circuit Court of two offenses: possession of child pornography under § 573.037, RSMo, and promoting child pornography in the first degree by offering to disseminate it, § 573.025, RSMo. The charges stemmed from video files containing child pornography found on Tremaine's computer which he had downloaded using peer-to-peer file-sharing software known as LimeWire. Although the child pornography files on Tremaine's computer were located in a folder labeled "Incomplete," his computer was set to enable other LimeWire users to have access to, and download, the files in his Incomplete folder.

Tremaine makes two arguments on appeal. First, he argues that the evidence was insufficient to prove beyond a reasonable doubt that he offered to disseminate child pornography. Second, he contends that it violated his constitutional right to be free from double jeopardy to simultaneously convict him of possession and promotion of child pornography based on the same computer files.

AFFIRMED.

Division One holds: We assume that, to sustain Tremaine's conviction, it is necessary for the State to establish that he knowingly offered to disseminate the

child pornography files on his computer to other LimeWire users. Even if such knowledge is required, the evidence was sufficient to support Tremaine's conviction for promoting child pornography. The jury could reasonably find that Tremaine was aware that the child pornography files he had downloaded came from the computers of other individual LimeWire users. His computer was set to enable the sharing of files in the "Incomplete" folder where the child pornography was located, and sharing from the Incomplete folder was actually occurring when Tremaine's computer was seized. The jury could conclude that Tremaine had actively enabled this sharing to occur. Tremaine indicated to law enforcement officers that he had a working knowledge of the LimeWire software. Finally, Tremaine's trial testimony attempted to minimize his knowledge of the LimeWire software, and his knowledge as to how child pornography came to be located on his computer, contradicting the statements he initially made to law enforcement officers. If the jury disbelieved Tremaine's trial testimony, as it was entitled to do, its rejection of that testimony provides additional, affirmative evidentiary support for the guilty verdicts. While there may be no *per se* rule that a defendant's use of peer-to-peer file-sharing programs like LimeWire establishes guilt for offering to disseminate child pornography, the evidence here goes much further.

Tremaine's double-jeopardy argument is that he could not be simultaneously convicted of possession of child pornography and promotion by offering to disseminate child pornography because possession is a lesser included offense of promotion of child pornography. Tremaine relies heavily on our recent decision in *State v. Kamaka*, 277 S.W.3d 807 (Mo. App. W.D. 2009), in which we held that double jeopardy barred the conviction of a defendant for possession of child pornography and promotion of child pornography by disseminating it.

Kamaka is distinguishable, and its analysis leads to the opposite result here. *Kamaka*'s holding was limited to the specific method of "promotion" of child pornography charged in that case: namely, dissemination. The court concluded that dissemination of child pornography necessarily required the defendant to also possess the material. Here, however, Tremaine was not charged with promotion by dissemination; he was charged with promotion by *offering to disseminate* child pornography. We can easily conceive of circumstances in which a defendant could offer to disseminate child pornography without also possessing the material, and *Kamaka* itself recognized such a possibility. Because it is possible to commit the offense of promotion of child pornography by offering to disseminate it without also committing the offense of possession of child pornography, possession is not a lesser included offense of this type of promotion. Tremaine's simultaneous conviction of both possession and promotion of child pornography accordingly did not violate double jeopardy.

THIS SUMMARY IS UNOFFICIAL AND SHOULD NOT BE QUOTED OR CITED.